2-3001-5614-1

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA TRANSPORTATION REGULATION BOARD

Proposed Rules Relating
to Practice and Procedure,
Minn. Rules Parts
8920.0100 - 8920.4000

REPORT OF THE
ADMINISTRATIVE LAW JU

The above-entitled matter came on for a public hearing before Administrative Law Judge Bruce D. Campbell, commencing at 9:30 a.m. on Nover 21, 1991, at the Board's Offices in South St. Paul, Minnesota, and continue until all interested persons present had an opportunity to participate by asking questions and presenting oral and written comments.

The Report is part of a rulehearing procedure required by Minn. Stat. §§ 14.01 - 14.28 (1991) to determine whether the proposed rules governing practice and procedure before the Transportation Regulation Board should be adopted by the Board. Members of the panel appearing at the hearing include Timothy S. Perry and Mary Sarazin Timmons, members of the Transportation Regulation Board staff. Margie Hendriksen, Special Assistant Attorney Gener 707 American Center Building, 150 East Kellogg Boulevard, St. Paul, Minneso 55101, appeared on behalf of the Board. Richard Helgeson, Chairman, and Boa Members Lorraine E. Mayasich and Eldon E. Keehr also attended the hearing. witness was solicited by the Board to appear on its behalf.

Four members of the public signed the hearing register at the hearing a two members of the public provided oral comments. At the hearing, the Board submitted Bd. Exhibits 1-17C inclusive. In addition to the Board exhibits, Administrative Law Judge received timely comments from Indianhead Truck Line Inc., the Minnesota Transport Services Association, and Samuel Rubenstein. Board also provided a response to public comments. The record of this proceeding closed for all purposes on December 16, 1991.

The Chief Administrative Law Judge, acting pursuant to Minn. Stat. § 14.15, subd. 2 (1990), has extended the time for the filing of this Report the Administrative Law Judge, and this Report was issued by the Administrati Law Judge within the period of extension so granted.

The Minnesota Transportation Regulation Board must wait at least five working days before taking any final action on the rules; during that perio this Report must be made available to all interested persons upon request.

Pursuant to the provisions of Minn. Stat. § 14.15, subd. 3 and 4, this Report has been submitted to the Chief Administrative Law Judge for his approval. If the Chief Administrative Law Judge approves the adverse findi of this Report, he will advise the Board of actions which will correct the defects and the Board may not adopt the rule until the Chief Administrative Judge determines that the defects have been corrected. However, in those

instances where the Chief Administrative Law Judge identifies defects which relate to the issues of need or reasonableness, the Board may either adopt t Chief Administrative Law Judge's suggested actions to cure the defects or, i the alternative, if the Board does not elect to adopt the suggested actions, must submit the proposed rule to the Legislative Commission to Review Administrative Rules for the Commission's advice and comment.

If the Board elects to adopt the suggested actions of the Chief Administrative Law Judge and makes no other changes and the Chief Administrative Law Judge determines that the defects have been corrected, th the Board may proceed to adopt the rule and submit it to the Revisor of Statutes for a review of the form. If the Board makes changes in the rule other than those suggested by the Administrative Law Judge and the Chief Administrative Law Judge, then it shall submit the rule, with the complete record, to the Chief Administrative Law Judge for a review of the changes before adopting it and submitting it to the Revisor of Statutes.

When the Board files the rule with the Secretary of State, it shall giv notice on the day of filing to all persons who requested that they be inform of the filing.

Based upon all the testimony, exhibits and written comments, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Procedural Requirements

1. On May 23, 1991, the Transportation Regulation Board filed the following documents with the Chief Administrative Law Judge:

(a) A copy of the Petition for Hearing received by the Board, signed b the requisite number of persons.
(b) A proposed Order for Hearing.
(c) A copy of the proposed Rules with a certificate of approval as to form by the Revisor of Statutes.
(d) The Notice of Hearing proposed to be issued.
(e) A Statement of the number of persons expected to attend the hearin
(f) A Statement of discretionary additional public notice.
(g) The Statement of Need and Reasonableness.

2. On June 6, 1991, the Board filed with the Administrative Law Judge Amended Statement of Need and Reasonableness. Bd. Ex. 15.

3. The Rules as proposed were published in the State Register on March 18, 1991, at volume 15, pp. 2096-2104, when the Board believed the ru were noncontroversial.

4. On June 26, 1991, the Board filed the following documents with the Administrative Law Judge:

(a) The Notice of Hearing as mailed.
(b) The Agency's certification that its mailing list was accurate and complete.

(c) The Affidavit of Mailing the Notice to all persons on the Agency's li
(d) The Affidavit of Additional Notice, showing publication in the Board's weekly calendars.
(e) The names of Board personnel who would appear for the Board at the hearing, together with the names of any witnesses solicited by the Board to appear on its behalf.
(f) All materials received following a Notice made pursuant to Minn. Stat. § 14.10 (1990), together with a photocopy of the pages of th State Register on which the Notice was published.
(g) A photocopy of the pages of the State Register on which the Notice and proposed rules were published.

5. Due to the unavailability of a member of the Board's staff, the hearing was continued. Notice of the continuance was published in the Transportation Regulation Board's weekly calendar of July 19, 1991, sent to persons on the Agency's mailing list, and published in the State Register.

6. On October 28, 1991, the Board filed the following documents with Administrative Law Judge:

(a) A photocopy of the page in the State Register giving notice of the amended hearing date of November 21, 1991.
(b) A copy of the Notice of rescheduling published in the TRB calendar October 18, 1991.
(c) A copy of the Notice of rescheduling mailed to all persons on the Board's mailing list for hearing notification.
(d) A copy of the Board's mailing list, with a certification of completeness as of the date of the mailing of notice of the rescheduled hearing.

7. At the hearing herein, the Board filed with the Administrative Law Judge, as Board Exhibit 11, a statement of amendments to its Revised Stateme of Need and Reasonableness and amendments to the rules proposed by the Board Bd. Ex. 11.

8. At the request of the Administrative Law Judge, on December 6, 199 the Board filed with the Administrative Law Judge a summary of its proposed amendments and a hand-engrossed copy of the proposed rules, with all final deletions and amendments. This document has been included in the official record as Board Exhibit 18. For purposes of this Report, the Administrative Law Judge will rely on Board Exhibit 18 for the text of the Board's final proposals in this proceeding. All persons were notified at the hearing that such a document would be filed and it was available for public review during the comment period.

9. The period for submission of written comments remained open throug December 11, 1991, the period having been extended by Order of the

Administrative Law Judge, on the hearing record, to 20 calendar days follow
the close of the hearing. Pursuant to Minn. Stat. § 14.15, subd. 1 (1990),
additional three business days were allowed for the filing of responsive
comments. The record closed for all purposes on December 16, 1991.

Nature of Proposed Rules

10. The Minnesota Transportation Regulation Board is required by statu to adopt rules governing its practice and procedure. Prior to the promulgat of its own rules of practice and procedure, Minn. Stat. § 174A.06 (1990), continues in force the applicable rules of the Public Service Commission, th Public Utilities Commission and the Department of Transportation. Although proposed rules are, in form, new rules, many of the provisions continue in effect verbatim, except for the designation of the agency, former rules of practice and procedure of the Board's predecessor agencies. These rules of practice are, therefore, the Board's proposal with respect to the pre-existi rules it desires to retain and such new rules governing its practice and procedure as it deems appropriate.

Statutory Authority

11. The Board's statutory authority to adopt rules of practice and procedure is contained in Minn. Stat. §§ 174A.02, 174A.04 and 174A.06 (1990) The statutory sections cited specifically authorize the Board to adopt rules governing the regulation of the State transportation industry. The statuto sections relied upon by the Board clearly authorize the adoption of the proposed rules.

Small Business Considerations

12. Complying with the Board's Rules of Practice and Procedure may hav some unknown monetary effect on small businesses, as defined by Minn. Stat. § 14.115 (1990). In its Statement of Need and Reasonableness, the Board sta that it has considered the impact of the proposed rules on small businesses concluded that its rules of practice and procedure must be uniform so that t process afforded each claimant or protestant will not vary as a result of th size of the business involved or the size of an adversary's business. The Board does not provide further detail in the Revised Statement of Need and Reasonableness about the factors it considered or the manner in which it reached its conclusions. The Minnesota Transport Services Association, in i comments of December 11, 1991, asserts that the Board has not properly tailo its rules of practice and procedure to accommodate the interests of small businesses. The areas of concern asserted by the Association include the following: the formality of the filings required by the Board; the rule regarding the appearance of nonlawyers; the rule regarding standing to appea in a proceeding when no protest or petition in intervention has been filed; the rule relating to transcripts. Because of the later Findings of the Administrative Law Judge regarding the issues raised by the Association, the Administrative Law Judge finds that the Board has appropriately accommodated the interests of small business as required by Minn. Stat. § 14.115 (1990).

Definitions, Scope and Construction

13. Proposed Rule pt. 8920.0100 contains 16 definitions of terms that used throughout the rules. Only subparts 3, 12, 13 and 15 were the subject either public comment or a proposed amendment by the Board. The portions o the proposed definitions which were not the subject of adverse

public comment or suggested amendments are discussed in the Statement of Nee and Reasonableness. They are found to be both needed and reasonable.

14. Subpart 3 defines the term "Complainant". In comments filed by Ja E. Ballenthin, Bd. Ex. 12A, he states that the proposed definition does not reflect the intent of the Board. He suggested that language be added to differentiate between a violation of law committed by an individual and some inappropriate action or failure to act by the Board. In its Statement of Proposed Amendments, Bd. Ex. 18, the Board proposed the following amendment subpart 3: In the second line of the subpart, strike the word "that" and insert the phrase "of a person who violates" and in the third line of the subpart before "(3)" insert the word "that". The effect of the proposed amendment is to adopt the suggestion of Mr. Ballenthin. The definition of t term "complainant", as amended, is both needed and reasonable, in that it differentiates between improper activity by individuals and some failure or improper action on the part of the Board. Since the amendment merely clarif the intent of the Board in response to public comment, it does not constitut prohibited substantial change within the meaning of Minn. Stat. § 14.15, subd. 3 (1990), and Minn. Rules pt. 1400.1100, subp. 1 (1991).

15. Subpart 12 defines "Proof of service". The definition requires an affidavit of service that includes a statement of the "time" and manner of service. In Bd. Ex. 12C, Robert S. Lee comments that in modern practice it almost impossible to record accurately the time of service, when service is usually accomplished by mail. He suggests that the word "time" be deleted a the word "date" inserted. The Revised Statement of Need and Reasonableness, Bd. Ex. 15, p. 14, indicates that the word "time" as used in the subpart is meant to refer to the date. It is both necessary and reasonable to require document showing that the appropriate parties have been served. To the exte that the word "time" means exactly the same as the word "date" in the contex of the subpart, the rule as drafted is both needed and reasonable. To avoid any misunderstanding, however, the Administrative Law Judge strongly suggest that the Board insert the word "date" for the word "time" in subpart 12, as suggested in Bd. Ex. 12C, p. 1. That is, apparently, the sense in which the Board uses the word. Bd. Ex. 15, p. 14. Such an amendment is a minor clarification not constituting a prohibited substantial change.

16. Subpart 13 defines a "Protestant" as a party objecting in a motor carrier proceeding. Mr. Lee, in Bd. Ex. 12C, p. 2, argues that the term "protestant" should only apply in the context of a petition for motor carrie operating authority. He also suggests that subpart 13, as drafted, is circu when subpart 7 is also considered. The definition of the word "party" in subpart 7 includes a reference to a "protestant". Subpart 13 which defines protestant includes a reference to the definition of "party" contained in subpart 7. The result, Mr. Lee argues, is an impermissible circularity of definition. The definition of "protestant" contained in subpart 13 is

identical to Minn. Rules pt. 7830.0100, subp. 14 (1985), the existing applicable rule, initially promulgated by the Public Utilities Commission.

17. The Board, however, in its Revised Statement of Need, Bd. Ex. 15, p. 14, appears to recognize that a limitation on the definition of the word "protestant" would be appropriate. The Board notes:

> Because an intervenor may object in a rate proceeding, the definition could be modified or clarified to restrict the time [sic] to operating authority matters.

The precise meaning of that statement contained in the Revised SONAR is not clear. It apparently, however, recognizes that the word "protestant" may properly be limited to transportation authority cases, as suggested by Mr. in Bd. Ex. 12C, p. 2.

18. Under Minn. Rules pt. 1400.0500, subp. 1C (1991), when an agency not propose to change a portion of an existing rule, it need not demonstrate the need for and reasonableness of the existing rule. An existing definitio for which no amendment is proposed, however, may be inappropriate in the context of revised rules for other reasons, such as vagueness or illegality In the context of these revised rules, continued use of the PUC's definition "protestant" is improper as being inaccurate, confusing and circular.

19. To correct the defect, the Board must strike the words "motor carrier" in the second line of subpart 13 and insert after the word "proceeding" in the same line the following: "involving a petition for boar permission, authorization or approval of new, additional or modified motor carrier operating authority". This change also requires the following chang in part 8920.0700. In line 2 of subpart 1, strike the word "the" and add th word "a" and after the word "proceeding" insert the following: "involving a petition for Board permission, authorization or approval of new, additional modified motor carrier operating authority." The word "party" must also be stricken in line 1 of subpart 13 and the defined term "person" must be inserted, in accordance with the suggestion of Mr. Lee. Bd. Ex. 12C, p. 2. This would avoid the circularity in definitions currently existing between subpart 13 and subpart 7, without affecting the meaning of either subpart.

20. The required changes to subpart 13 do not result in prohibited substantial changes, since the revised definition is in accordance with comm practice before the Board and is merely a clarification resulting from publi comment at the hearing. It does not enlarge the application of the rules.

21. Subpart 15 defines the term "Service date". The definition curren states that for a board order, the service date is the date stamped in the upper righthand corner of the order. For a letter or notice, it is the date typed in the upper righthand corner of the document. Mr. Ballenthin, in Bd Ex. 12A, p. 1, argues that the second sentence of the rule should be modifie to allow the Board flexibility as to where and how it indicates the service date in its Orders. In Bd. Ex. 18, in response to Mr. Ballenthin's comment, the Board proposed to strike the second and third sentences of the subpart. This change would allow the Board the flexibility Mr. Ballenthin suggests is appropriate. The rule as amended is found to be both needed and reasonable There is certainly no need to define the location in the document where the issue date would be stamped. The change proposed by the Board in Bd. Ex. 18 only a clarification resulting from public comment which does not affect the

application of the rules. It is, therefore, not a prohibited substantial change.

22. Part 8920.0150 relates to the computation of time. The rule compo with the existing civil rule, except for the language relating to use of the Central Mailing Section of the Publications Division of the Department of Administration in subpart 2. In Bd. Ex. 12C, at p. 2, Mr. Lee argues that a person who receives a document that has been mailed through the Central

Mailing Section is unaware of that fact and has no notice that extra time is now afforded to an opposing party. In Bd. Ex. 18, p. 1, the Board proposes delete the last sentence of subpart 2 of Part 8920.0150 because of Mr. Lee's comments. Because the remaining portions of the part comport with existing civil rule of procedure relating to the computation of time and allowing additional time when mail is used, the subpart, as amended, is found to be needed and reasonable.

23. Because the proposed deletion from Part 8920.0150 is a clarificati resulting from public comment which does not affect the application of the rules, it is not a prohibited substantial change.

24. Part 8920.0200 states the scope and application of the proposed rules. As initially drafted, the rules incorporated the contested case rule of the Office of Administrative Hearings by reference. See proposed Rule Pa 8920.3100, subp. 4. This was done to recognize the requirements of Minn. St § 14.51 (1990). That section provides that the rules of the Office of Administrative Hearings, Minn. Rules Part 1400.5100 - 1400.8401 govern the conduct of chapter 14 contested case proceedings heard by an Administrative Judge and supersede any conflicting agency rules. In its Statement of Propo Amendments, Bd. Ex. 18, the Board proposed to delete that incorporation by reference. It, therefore, becomes of paramount importance that part 8920.02 clearly state that the proposed rules have no application to the practice an procedure before an administrative law judge conducting a contested case hearing for the Board. Any other attempted scope or application of the proposed rules would violate Minn. Stat. § 14.51 (1990). Administrative Law Judge Allan Klein, in Bd. Ex. 12D, discusses the primacy of OAH rules. Mr. Lee, in Bd. Ex. 12C, made a similar statement. In its Statement of Propose Amendments, Bd. Ex. 18, the Board proposed to add the following statement at the end of the part:

> After a case is referred to the Office of Administrative Hearings, chapter 1400 applies.

The Administrative Law Judge believes it necessary that the Board clearly li the scope and application of its proposed rules to exclude any portion of a contested case hearing, as defined in Minn. Stat. § 14.02, subd. 3 (1990), t is before the Office of Administrative Hearings. The language the Board proposes to adopt does not clearly accomplish that result. Chapter 1400 doe not always thereinafter apply to a case that has been referred to the Office Administrative Hearings. Once the Administrative Law Judge issues his Repor jurisdiction over the matter reverts to the Board, even though chapter 1400 applied during the hearing process. When the case is back before the Board, is perfectly appropriate for its rules to apply. The suggested amendment by the Board, therefore, is an inaccurate statement of law. Without an appropriate amendment limiting the application of the rules, either Minn. St

§ 14.51 (1990) is violated or the rules are entirely confusing when a case i
before an administrative law judge.

25. To correct the defect, the Board must adopt substantially the language stated in Bd. Ex. 12D, p. 1:

> After the assignment of a case to the Office of Administrative Hearings, the rules of the Office of Administrative Hearings govern the conduct of the case

until the issuance of the final report of the Administrative Law Judge.

As amended, the part is found to be needed and reasonable. It is an accurate statement of law regarding the application of the rules and will av confusion.

26. The inclusion of the language required by the Administrative Law Judge does not constitute a prohibited substantial change. The amendment is result of public comment and merely states accurately existing law.

Initiating a Proceeding; Form

27. Part 8920.0300 describes the manner in which a proceeding may be initiated. The rule provides that a proceeding may be initiated by a formal informal complaint, a petition, or a motion by the Board. The only public comment received on this section was made by Mr. Lee in Board Ex. 12C, p. 2. He suggested that it would be appropriate to include in paragraph B, after t word "granting" in the first line of paragraph B and before the word "of", t phrase "or modifying". It is suggested that such modification is necessary because no other phraseology would recognize a proceeding to modify an exist grant of rights from the Board, although such cases are not unknown. In in Ex. 18, the Agency proposes to add the words "or modifying" between the word "granting" and the word "of" in paragraph B of part 8920.0300, in response t Mr. Lee's comment. Part 8920.0300, as amended, is both needed and reasonabl in that it states the possible ways in which a proceeding before the Board m be commenced under these rules. Adding the words "or modifying" in paragrap as proposed by the Board is appropriate to account for cases in which a petition is filed to modify existing rights. This part as amended is found be both needed and reasonable.

28. The amendment to this part is not a prohibited substantial change It is responsive to public comments and it does not unduly enlarge the application of the rules. It merely accounts for a number of existing cases within the rule.

29. Part 8920.0400 relates to titles and references to parties. It di not receive adverse public comment and is supported in the Board's Revised Statement of Need and Reasonableness. The part is, therefore, found to be n needed and reasonable.

Parties, Interested Persons, Joinder

30. Part 8920.0500 relates to the denomination of parties and the righ that a party enjoys. In his comments to the Board, Judge Klein states that

believes the rule is inappropriate as conflicting with a variety of OAH procedural rules, including Minn. Rules Pts. 1400.6200 and 1400.7100. Becau the Board has properly amended these rules, in part 8920.0200, to exclude application to any portion of a hearing before an administrative law judge, must be the Board's intention to apply this part only to hearings before the Board. The second sentence of this part is, however, illegal in that it ref to practice before an administrative law judge. It conflicts with Minn. Sta § 14.51 (1990). See, Bd. Ex. 12D, p. 2. The Board may not define

the rights a person has before an administrative law judge, in conflict with OAH rules.

31. To correct the defect, the Board must insert, after the word "proceeding" and before the word "may" in the fourth line of the part, the phrase "before the Board" and in the third to the last line and second to the last line, strike the phrase "the administrative law judge's" and insert the word "a". As amended, the part is found to be needed and reasonable. Since the corrective amendment merely limits the application of the rule to its legally appropriate subject matter under Minn. Stat. § 14.51 (1990), it is not a prohibited substantial change.

32. Part 8920.0600 relates to intervention. It states the manner in which a person may become a party to the proceeding and the interest he or she must possess. Judge Klein, in Bd. Ex. 12D, p. 2, stated that the rule would be appropriate if it applied only to proceedings before the Board. To the extent that it was meant to apply to intervention while a case is before an administrative law judge, it conflicts with Minn. Rule pt. 1400.6200 (1991), a violation of Minn. Stat. § 14.51 (1990). Judge Klein suggested language should be added that would clearly limit the application of the rule to cases not actively before an administrative law judge. Mr. Lee, in Bd. Ex. 12C, p. 3, made similar comments. In Bd. Ex. 18, the Board proposes to adopt Judge Klein's suggestions by adding the language "before the case is assigned to an administrative law judge," prior to the words "other persons" in the first line of the subpart and by inserting at the end of the subpart the following: "after the assignment of a case to an administrative law judge, persons seeking to intervene must proceed pursuant to part 1400.6200." The part, as amended, is both needed and reasonable. The part as amended states the correct legal test for standing to intervene and does not conflict with Minn. Rules pt. 1400.6200 (1991). The amendments proposed by the Board do not constitute a substantial change. They merely make the part consistent with Minn. Stat. § 14.51 (1990).

33. Part 8920.0700 relates to protestants and the manner in which a competing motor carrier may become a protestant. As a result of Finding 19, supra, the amendment to this part contained in that Finding must be included in part 8920.0700, subp. 1 of the proposed rules.

34. Subpart 3 of part 8920.0700 proposes to exclude a motor carrier who does not file a timely protest from becoming a party to a motor carrier proceeding. If this subpart is meant to apply to a proceeding before an administrative law judge, it conflicts with Minn. Rules pt. 1400.6200 (1991). Once a contested case is referred to the Office of Administrative Hearings, only the administrative law judge has the authority to determine whether a person has the requisite interest to participate as a party. The Board may by indirection frustrate this power of an administrative law judge given by rules of the Office of Administrative Hearings. Minn. Stat. § 14.51 (1990)

Given the limited scope of the application of the rules stated in Minn. Rule
pt. 8920.0200, as amended, this subpart must be construed to apply only to
proceedings before the Board or to a proceeding prior to its assignment to a
administrative law judge. Since this is the only legally acceptable
interpretation of the subpart, the Administrative Law Judge strongly suggest
that the following sentence be added after subpart 3: "This subpart does no
apply to a request to participate in a proceeding that has been assigned to
administrative law judge. With respect to such request,

the rules of the Office of Administrative Hearings apply." Because the Administrative Law Judge believes that the Board intends subpart 3 to be rea so as not to conflict with Minn. Stat. § 14.51 (1990), however, the failure include the suggested language is not a defect. Its inclusion, however, wou substantially increase the clarity of the final rules.

35. Mr. Ballenthin, in Bd. Ex. 12A, p. 2, suggests that the Board adop rule which would define the phrase "timely filed". Mr. Ballenthin suggests that the rule does not clearly state whether something is timely filed when is placed in the mails by the due date or whether it must be received by the due date. He suggests that a rule similar to Rule 125.01 of the Rules of Ci Appellate Procedure be adopted. Mr. Ballenthin also suggests that part 8920.0700 be amended to allow for a late filed protest on a showing of good cause where there is no prejudice to the petitioner. The Board did not resp directly to either of Mr. Ballenthin's comments.

36. The failure of the rules to define when a timely filing has been accomplished is not a defect. The word "filed" with reference to an officia document that must be deposited with a public official or court means actual receipt by the public official or court. The word "filed" applies only when there is a writing and where the writing has been actually delivered, rather than merely deposited in the mail. State v. Erickson, 188 N.W. 736 (Minn. 1932). In State v. Parker, 278 Minn. 53, 153 N.W.2d 264, 266 (Minn. 1967), court held:

> The meaning of the term "filed" is plain and means that the notice must actually be received by the clerk within six months after judgment.

Hence, in the absence of a contrary definition, a timely filed protest is on which is physically received by the Board within the 20-day time period. Mi Stat. § 174A.02, subd. 4 (1990) requires a similar conclusion. Since the wo "filed" has a precise legal meaning, the absence of a definition of that ter in the rules does not constitute a defect. The Revised Statement of Need an Reasonableness, at page 19, however, contains the following statement:

> To be timely, a protest must be postmarked by the final protest date, or hand-delivered to the Board's office before 4:30 p.m.

This statement in the SONAR makes it unclear whether the intention of the Bo is that "filed" means actual receipt by the Board within the time period or deposit in the mails. If the Board wishes to deviate from the legally accep definition of the term "filed" and include as timely filed documents which a postmarked by the date specified, it should include in the definitional section, Minn. Rules pt. 8920.0100, a definition of the word "filed" which would vary the normally accepted legal meaning of the term. It should also

noted that part 8920.0150, subp. 2 adds three days to the time allowed when mails are used. If it chooses to adopt such a changed definition of the wo "filed", that amendment would not constitute a substantial change. It would not enlarge the application of the rules to new subject matters or result in rule fundamentally different in effect from that contained in the Notice of Hearing. The Board should consider its ability to vary the definition of "filed" with respect to the 20-day period for filing a protest, however, in light of Minn. Stat. § 174A.02, subd. 4 (1990).

37. As a consequence of Findings 33-36, supra, part 8920.0700, as amen in Finding 19, supra, is found to be needed and reasonable.

38. Minn. Rules pt. 7830.0800 (1985), the rule currently applicable, i relevant part, provides:

> A motor carrier desiring to participate in the proceeding who has not filed a timely notice of intent to protest as required by this part shall not be admitted as a party to the proceeding, except for good cause shown.

Board Ex. 14A, p. 82. The existing rule, therefore, comports with the suggestion by Mr. Ballenthin that late-filed protests be accepted for cause shown. The Board does not state in the SONAR or in any other filing why it chose to amend the proposed rule. The failure to include a good cause exception to the timely filed protest requirement, however, is not a defect the rule. The same effect is accomplished by renumbered section 8920.4500, under which the Board may grant a variance when enforcing the rule would imp an excessive burden on a person affected by the rule and when granting the variance would not adversely affect the public interest. Proposed part 8920.2800 also allows the Board to grant extensions of time to accomplish a filing for cause shown.

39. Mr. Lee, in Bd. Ex. 12C, p. 3, suggests that it is inappropriate t include with the protest a copy of the operating authority held by the protestant. He suggests rather that there be a statement of the authority h by the protestant in conflict with the petition. The Board did not respond Mr. Lee's suggestion. It is well within the discretion of the Board to requ the full filing of copies of the protestant's operating authority. That authority is then available for persons to review and determine authoritativ whether any actual authority is in conflict. The summary suggested by Mr. L while perhaps helpful in some cases, would not serve the function that the Board contemplates by the filing of complete operating authorities.

40. Part 8920.0800 attempts to restate Minn. Rule pt. 1400.6200, subp (1991). As indicated by Judge Klein in Bd. Ex. 12D, p. 2, to the extent tha the rule attempts to govern the conduct of an administrative law judge durin contested case hearing, it is illegal. Mr. Lee, in Bd. Ex. 12C, p. 3, also states that the rule is unnecessary because of Rule 1400.6200, subp. 5. In accordance with Findings 24 and 25, supra, the only justification for the proposed rule is that it is meant to apply to proceedings before the Board i which an administrative law judge is not actively involved. Any other construction would be legally inappropriate. Minn. Stat. § 14.51 (1990). Since that is the only appropriate application of this part, the reference t the "administrative law judge" in the first line of the part exceeds the Board's legal authority and is a prohibited defect.

41. To correct the defect, the Board must strike the phrase "The administrative law judge" in the first line of the first paragraph of the pa and insert the following: "In proceedings before the Board, it". In the fi line of the second paragraph of the part, the Board must also insert after t word "proceeding" the phrase "before the Board". Addition of the language required by the administrative law judge would not result in a

prohibited substantial change, since the changes are required as a matter of law to avoid a conflict with the rules of the Office of Administrative Hearings. As amended, the part is found to be needed and reasonable. It allows for limited public participation when a person does not desire to be a formal party to a proceeding.

42. Part 8920.0900 relates to the joinder of several persons in one pleading. The part is justified in the SONAR, as revised, and it did not receive adverse public comment. The part is found to be both needed and reasonable.

Pleadings

43. Part 8920.1000 describes the types of pleadings before the Board. member of the public commented adversely on this part and it merely summariz the possible pleadings that are discussed elsewhere in the rules. The part found to be both needed and reasonable.

44. Part 8920.1100 discusses the form of an informal complaint. The Department of Transportation, in Bd. Ex. 12B, anticipates a potential confli with Minn. Stat. § 13.72, subd. 6 (1990). That subdivision provides that th names of complainants and complaint letters and data furnished to the DOT regarding infractions of chapter 221 are confidential or protected nonpublic data, not disclosable to the offending party.

It should be noted that Minn. Stat. § 13.72, subd. 6 (1990), only appli to unsolicited complaints made to the Department of Transportation. It has application to informal complaints addressed to the Board for redress. Hence subpart 2 of part 8920.1100 which requires the name and address of the complainant does not violate the cited section of the Data Practices Act. the Department of Transportation believes that Minn. Stat. § 13.72, subd. 6 (1990) requires it to adopt protective procedures in its interaction with th Board, apart from Minn. Stat. § 13.03, subd. 4 (1990), it should implement t internal procedures it believes are legally required. The concerns expresse by the DOT do not, however, affect the legality of the rule.

45. Part 8920.1100 is discussed in the Revised SONAR and did not recei adverse comment, other than the observation by the DOT discussed in the previous Finding. The part is, therefore, found to be needed and reasonable

46. Part 8920.1200 relates to responses to informal complaints. Both Ballenthin and Mr. Lee argue that the complainant should be furnished with a copy of the answer to the informal complaint, rather than just receiving a statement of the substance of the response. Bd. Ex. 12A, p. 2; Bd. Ex. 12C, p. 3. Apparently, the Board staff anticipates informing the complainant eit orally or in writing of the Board's total interaction with the offending

carrier. While the carrier may file a written response, a normal case may a
involve oral communication or questioning between the Board staff and the
offending carrier. In that instance, it would be impossible to provide the
complainant with a verbatim transcription of the entire interaction between
Board staff and the complainant. Due process requires that a person receiv
appropriate notice of an administrative action. Anderson
v. Moberg Rodlund Sheet Metal Co., 316 N.W.2d 286, 288 (Minn. 1982). Due
process is satisfied if the person receives a communication which includes

information which would provide such notice. The rule satisfies the minima requirements of due process. Part 8920.1200 is found to be needed and reasonable.

47. Part 8920.1300 deals with the filing of informal complaints. No member of the public commented adversely on this part. It is found to be bo needed and reasonable.

48. Part 8920.1400 relates to the content of a formal complaint. The Minnesota Transport Services Association argued that this rule and other ru relating to the formal complaint procedure demonstrate that the Board has no accommodated its proceedings and processes to the needs of small business, particularly members of the Association who would qualify as a small busines as defined in Minn. Stat. § 14.115, subd. 1 (1990). In particular, the Association, in its comments of December 11, 1991, argues that the TRB has demonstrated an apparent rigid preference for legalistic district court type formality in pleadings. It suggests, rather, that the Board adopt standard forms for use by members of the Association. The Board, in its responsive comments of December 16, 1991, argues that the proposed rules do not impose new pleading requirements on parties to Board proceedings. Instead, the Boa has carried forward the same procedural requirements that motor carriers hav been subject to under the PUC rules. The Board offers to allow its staff an counsel to consult with Mr. Rosenthal and other interested members of the public to develop forms which would meet the requirements of the rules, apar from this proceeding. The Administrative Law Judge finds that Minn. Rules pt. 8920.1400 is both needed and reasonable. Small businesses have availabl to them the alternative to the formal complaint described in Minn. Rules pt. 8920.1100 and an informal complaint may be as simple as a letter to the Board under that part. Since alternative procedures are available to small businesses, other than the use of the formal complaint, when they wish to br to the attention of the Board a violation of Minn. Stat. ch. 221 (1990), the argument of the Association is not persuasive. Further, as indicated by the Board, Minn. Rules pt. 8920.1400 is in all material respects identical to th existing rule. Minn. Rules pt. 7830.1300 (1985). The Board need not demonstrate the need for and reasonableness of a rule which continues an existing rule. See, Minn. Rules pt. 1400.0500, subp. 1 (1991).

49. Part 8920.1500 relates to the allegations required in a formal complaint and the joinder of several complaints in a single complaint. The Minnesota Transport Services Association, in its comments of December 11, 19 intend their allegations about the formal complaint procedure to apply equal to this part. For the reasons previously discussed, the Administrative Law Judge does not find the arguments of the Association that Minn. Stat. § 14.1 (1990), has been violated to be persuasive. Indianhead Truck Line, Inc., in its comments of December 9, 1991, makes an objection similar to that of the Association. Indianhead concludes that there is no reason to "require the ordinary person to employ professional help to file a complaint". However,

Indianhead overlooks the alternative availability of the informal complaint procedure. No person is required to employ professional help to file a form complaint when the informal complaint vehicle is equally available. Part 8920.1500 is found to be both needed and reasonable.

50. The following parts are discussed in the Revised SONAR and did not receive adverse public comment: Part 8920.1500, Investigative Data; Part 8920.1600, Tariff Reference; Part 8920.1700, Preference or Prejudice Alleged

and Part 8920.1800, Signature and Verification. These parts are found to be needed and reasonable.

51. Part 8920.1900 relates to the filing of a supplemental formal complaint. Judge Klein, in Board Ex. 12D, p. 2, states that once a case is assigned to an administrative law judge, part 8920.1900 would conflict with Rule 1400.5600, subp. 5 (1991). See also, Bd. Ex. 12C, p. 3. For the reasc discussed in Findings 24 and 25, supra, the Administrative Law Judge finds t it is the intent of the Board to apply this part only to situations in which case is not before an administrative law judge, either because the supplemer complaint was filed prior to the referral or because the proceeding is an original proceeding before the Board. Because that limitation must be read into part 8920.1900 as a consequence of the amendment to part 8920.0200, as discussed in Findings 24-25 , supra, this part does not illegally conflict w OAH rules. It is found to be needed and reasonable. To clarify the rule, however, the Administrative Law Judge strongly suggests to the Board that it add the following sentence at the end of the part: "This part applies only cases before assignment to an administrative law judge or to original proceedings before the Board." If that clarifying change is adopted by the Board, it would not result in a prohibited substantial change. The change merely clarifies and makes explicit a legal requirement.

52. Part 8920.2000, relating to the answer to a formal complaint, and part 8920.2100, relating to a reply to the answer, are discussed in the Revi SONAR and did not receive adverse public comment. They are found to be both needed and reasonable.

53. Part 8920.2200 relates to a petition for relief from the Board or grant of additional authority. The only comment received on this part was m by Mr. Lee. In Bd. Ex. 12C, p. 3, Mr. Lee argues that because there is no reference to existing standard petition forms maintained by the Board, the status of those forms are now in doubt. On the contrary, to the extent that the Board wishes to provide forms that satisfy the requirements of part 8920.2200, it is certainly free to do so. To specifically reference the for in the rule, however, would place on the Board a requirement to prepare and update appropriate forms. The Board is under no obligation, either legal or equitable, to make such forms available to the public. Hence, the reference Mr. Lee suggests would be inappropriate. It should be noted that the Board stated an intention to cooperate with members of its constituent regulatory community to make appropriate forms available. See, Board Reply Comments, December 16, 1991, p. 2. The Board is not abandoning its interest in facilitating public access through the availability of appropriate forms.

54. Mr. Lee, in Bd. Ex. 12C, p. 3, also questions the number of copies a petition that should be filed, as compared to other documents. The number copies an administrative agency desires to receive of a particular document, reasonable, is not open to question by the Administrative Law Judge. The Bo

best knows its own internal needs. To the extent the Board wishes to amend
provision of the rules to standardize the number of copies of particular
documents received, it is free to do so without creating a substantial chan
Failure to do so, however, is not a defect in the rules.

55. Part 8920.2200 is a rational statement of the information the Boa
requires for the processing of a petition. It is found to be both needed a
reasonable.

56. Part 8920.2300 relates to a petition to intervene in a contested c proceeding. As written, the rule purports to govern intervention even after case has been assigned to an administrative law judge for hearing. As noted Findings 24-25, supra, the Board only has jurisdiction to make its rules of practice and procedure applicable to original proceedings before the Board a to chapter 14 contested case hearings when an administrative law judge does have jurisdiction of the proceeding. The references to the procedure after assignment to the Office of Administrative Hearings, contained in subpart 1, conflict with Minn. Rules pt. 1400.6200 (1991), and are, therefore, illegal Minn. Stat. § 14.51 (1990).

57. To cure the defect, the Board must make the following corrections

1. After the heading in subpart 1 and before the words "A person", insert the following: "This part applies only to an original proceeding before the Board or a contested case proceeding prior to its assignment to the Office of Administrative Hearings."

2. In line 6 and 7 of subpart 1, strike the following language: "a petition to intervene must be filed at least ten days before the date set for hearing" and insert the following: "a petition to intervene should be filed pursuant to part 1400.6200."

3. In line 2 of subpart 2 after the word "intervene", insert "filed with the Board".

4. In line 1 of subpart 3, strike "The petition" and insert "A petition filed with the Board".

5. In line 1 of subpart 4, strike the phrase "The petition" and insert "A petition filed with the Board".

Since the amendments are legally required and merely limit the application o this part, they do not result in a prohibited substantial change. As amende in this Finding, part 8920.2300 is found to be needed and reasonable.

58. Mr. Lee suggests that subpart 4 of part 8920.2300 should be modifi in some respect to limit the requirement of service. Board Ex. 12C, p. 4. asserts that persons wishing to file a petition in intervention do not know identity of the other parties to the proceeding. That problem can always be resolved by contacting either the Board or the initial petitioner and requesting a list of the parties. Mr. Ballenthin, in Bd. Ex. 12A, p. 2, arg that the requirement in subpart 1 that an original and six copies of a petit

be filed with the Board is redundant, since that is already required by part
8920.2900. The Board may consider deleting the reference to six copies and
proof of service in subpart 1 since that number of copies is required by par
8920.2900. The retention of the reference to the number of copies and proof
service is not, however, a defect in the proposed rule.

59. Part 8920.2400 relates to answers to a petition to intervene. Aga
the rule, on its face, applies to practice before the administrative

law judge when a case has been assigned to the Office of Administrative Hearings. For the reasons stated in Findings 24 and 25, supra, the attempt apply this section to proceedings before the administrative law judge is illegal under Minn. Stat. § 14.51 (1990). Moreover, the part also conflicts with Minn. Stat. § 14.58 (1990). Bd. Ex. 12D, p. 3.

60. To correct this defect, the Board must modify this part as follows

1. In the first line of the part, strike "the proceeding" and insert " a proceeding before the Board".

2. The references to "administrative law judge" contained in the part must all be stricken and the word "Board" must be inserted instead.

Since this change is required to satisfy legal requirements, it does not res in a prohibited substantial change.

61. Mr. Ballenthin, in Bd. Ex. 12A, p. 2, states that the answer shou be required to be verified, since all petitions to intervene will have been verified. Minn. Rule pt. 8920.2300, subp. 3 does require that a petition to intervene must be verified. Hence, for internal consistency, it would be appropriate to strike the following sentence in part 8920.2400: "The answer need not be verified unless a petition to intervene has been verified" and insert the following: "The answers must be verified". Insertion of this clarifying language would not result in a prohibited substantial change, sin it is responsive to public comment and does not enlarge the application of t rules. Although the Board is free to adopt the amendment the administrative law judge has suggested, the failure to do so is not a defect. Since the petition will always be verified under part 8920.2300, subp. 3, the result o the rule, as written, will be that all answers will be verified. Part 8920.2400, as amended in Finding 60, is found to be needed and reasonable.

62. Part 8920.2500 relates to the scope of an intervenor's participati in a proceeding. The internal references to "administrative law judge" contained in the part demonstrate that the rule was meant to govern practice before an administrative law judge in a contested case proceeding. For the reasons stated in Findings 24 and 25, supra, the rule as drafted is illegal, since it conflicts with Minn. Stat. § 14.51 (1990) and Minn. Rules 1400.6200 (1991).

63. To correct the defect, the Board must do the following:

1. In the first line of the part, the word "The" must be stricken and the following inserted: "In proceedings before the Board, the".

2. All the references to "administrative law judge" in the part must be stricken and the word "Board" inserted instead.

This amendment is not a prohibited substantial change for the reasons stated Finding 57, supra. As amended in this Finding, part 8920.2500 is found to b needed and reasonable.

64. Part 8920.2600 relates to amendments to various types of pleadings. its terms, it applies to contested case proceedings before an administrative law judge. Bd. Ex. 12D, p. 3. For the reasons stated in Findings 24 and 25 supra, the provision may not legally be adopted by the Board, since it atte to regulate practice before the administrative law judge in violation of Min Stat. § 14.51 (1990).

65. To correct the defect, the Board must adopt language which limits application of the section to original proceedings before the Board or to o contested case proceedings prior to their assignment to the administrative judge. The following amendments would accomplish that result:

1. In the third line of subpart 1 of the part, strike the comma and insert a period. The remaining language to the end of that paragraph should be stricken and the following inserted: "After a case is assigned to an administrative law judge, amendments must be filed as motions pursuant to part 1400.6700 or 1400.5600, subp. 5, as appropriate."

2. The second full paragraph of subpart 1 should either be stricken or the following added: strike the first word of the second full paragraph of subpart 1 and insert "In proceedings before the Board, amendments". The two references to administrative law judge contained in that same paragraph must be stricken and the word "Board" inserted instead.

3. In the first line of subpart 2, the word "Rules" must be stricken and the following inserted: "In proceedings before the Board, rules".

The amendments would not constitute a substantial change for the reasons st in Finding 57, supra. As amended in this Finding, part 8920.2600 is found be needed and reasonable.

66. Part 8920.2700 relates to the service of pleadings or other docume initiating or relating to a proceeding before the Board. Items A, C and D this part attempt to regulate practice before an administrative law judge i violation of Minn. Stat. § 14.51 (1990). The part conflicts with Minn. Rul pt. 1400.5100 (1991). For the reasons stated in Findings 24 and 25, supra, part is illegal. Bd. Ex. 12D, p. 3.

67. To correct the defect, the Board must clearly limit the applicati of the part to proceedings before the Board. This could be accomplished by striking the reference to "administrative law judge" in item A of the part substituting the word "Board", and by deleting the phrase "or the

administrative law judge if the case has been referred to the Office of Administrative Hearings" in item C and inserting a period after the word "board" in item C. Finally, in item D, the phrase "or the administrative la judge" must be deleted. This amendment does not constitute a prohibited substantial change; it merely makes the part consistent with applicable law As amended, this part is needed and reasonable.

68. Part 8920.2800 relates to continuances and extension of time. On its face, it attempts to regulate practice before an administrative law judge in violation of Minn. Stat. § 14.51 (1990) and Minn. Rules pt. 1400.7500 (1991) Part 8920.2800 is illegal, for the reasons stated in Findings 24 and 25, sup

69. To correct the defect, the Board must amend the part as follows:

1. In the first line of the part, delete the word "For" and insert the following: "In proceedings before the board, for".

2. After the word "board" in line 2 of the part, insert a period and strike the following: "or the administrative law judge".

For the reasons stated in Finding 57, supra, the required amendment does not result in a prohibited substantial change. As amended, the part is found to needed and reasonable.

70. Part 8920.2900 relates to the dockets kept by the Board. The part supported in the Revised SONAR and did not receive adverse public comment. Part 8920.2900 is found to be needed and reasonable.

71. Part 8920.3000 relates to treatment of trade secret and proprietar information. Both Judge Klein, in Bd. Ex. 12D, p. 4, and Mr. Lee, in Bd. Ex. 12C, p. 5, stated that the rule conflicts with part 1400.6700, subp. 4 (1991). In Bd. Ex. 18, the Board proposed to amend the part by striking all references to the "administrative law judge" and inserting in lieu of that phrase the word "board". The part, as amended, is both needed and reasonabl as protecting trade secret information in proceedings before the Board. The amendment proposed by the Board does not result in a prohibited substantial change. It merely avoids an illegal conflict with the rules of the Office o Administrative Hearings.

Hearing; Notice and Formalities

72. Part 8920.3100 relates to hearings and, more particularly, when matters must be referred to the Office of Administrative Hearings and when t Board may conduct the proceedings. The part also relates to hearing procedu and other substantive rights and obligations attendant on hearings. Because the volume of comments on this part and the numerous amendments to this part each subpart is individually discussed.

73. Subpart 1 relates to the instances in which a matter must be refer to the Office of Administrative Hearings for a contested case hearing. The only comment received on this subpart was made by Mr. Lee. In Bd. Ex. 12C,

p. 5, he asserts that the Board should add another instance in which a heari
is required, when a petition for operating authority is protested and an iss
of fact is joined. Item B of subpart 1, however, requires a reference to th
Office of Administrative Hearings when a hearing is required by law. Minn.
Stat. § 174A.02, subd. 4 (1990), requires the Board to hold a contested case
hearing and refer the matter to the Office of Administrative Hearings under
following circumstances:

> If the Board receives a written objection and notice of intent to appear at a hearing to object to the petition from any person within 20 days of the notice having been fully given, the request of the petition shall be granted or denied only after a contested case hearing has been conducted on the petition, unless the objection is withdrawn prior to the hearing.

The reference of the statute is to sections relating to grants of motor carr authority or the transfer or assignment of such motor carrier authority and transportation by pipeline of certain products requiring a certificate of public convenience and necessity. Minn. Stat. § 221.55 (1990). The Board would be required under Minn. Stat. § 174A.02, subd. 4 (1990), to refer the case to the Office of Administrative Hearings under the circumstan described by Mr. Lee, as a result of item B of subdivision 1 of this part. Subdivision 1 is, therefore, both needed and reasonable.

74. Subpart 2 enumerates the circumstances under which the Board may determine a proceeding without a contested case hearing and without referri the proceeding to the Office of Administrative Hearings. Item A states that the Board may avoid a contested case hearing when it determines there are no material issues of fact to be resolved and the pleadings raise only issues o law or policy that can be resolved through briefs. A number of persons commented on this item. Indianhead Truck Lines, in its comments of Decembe 1991, supported the authority of the Board to, in effect, grant summary judgment, prior to the referral of a case to the Office of Administrative Hearings under the circumstances described in item A. Mr. Rosenthal, on beh of the Minnesota Transport Services Association, in his comments of Decembe 11, 1991, at page 6, argues that the provision is inappropriate unless the parties agree that there are no material issues of fact in dispute. The Association, in its comments of December 16, 1991, also asserts a due proces right to a hearing where one party believes there is a factual dispute. Mr Lee, in Bd. Ex. 12C, p. 5, argues that subpart 2A should be clarified by add the phrase "unless a hearing is required by law." Mr. Lee does not state th circumstances under which a hearing would be required by law. As noted in t previous Finding, there are circumstances under which a protested petition m proceed to a contested case hearing. These are cases involving an applicati for motor carrier authority or the transfer of motor carrier authority or th grant of a certificate of public convenience and necessity for the transportation of particular commodities by pipeline. Minn. Stat. § 174A.02 subd. 4 (1990). In those cases, the Board does not have an option. It must refer the matter to the Office of Administrative Hearings for a contested ca hearing. Item A, as drafted, is illegal as conflicting with Minn. Stat. § 174A.02, subd. 4 (1991).

75. To correct the defect, the Board must add, at the end of subpart 2 item A, after the word "briefs" and before the semicolon, the following: ", unless a hearing is required by law". The amendment to subpart 2, item A do not constitute a prohibited substantial change since it is necessary to make the item consistent with Minn. Stat. § 174A.02, subd. 4 (1990).

76. No party commented adversely on item B of subpart 2. Not holding contested case hearing when the parties waive the right to such a hearing ha some appeal. The Administrative Law Judge, however, does not believe that t

parties may unilaterally waive a hearing where one is required by law. Minn Stat. § 174A.02, subd. 4 (1990) and Minn. Stat. §§ 219.70 and 219.71 (1990) examples of situations in which the board must refer the case to an administrative law judge for at least the convening of a public, contested c hearing. The inability of the parties to waive convening a hearing is doubtless meant to prevent circumventing public testimony on matters affecti the public interest in local transportation. Item B is, therefore, illegal

77. To correct the defect, the Board must insert in item B of subpart after the word "hearing" and before the semicolon, the phrase ", unless a hearing is required by law". The amendment does not result in a prohibited substantial change.

78. Item C of subpart 2 provides that no hearing is necessary when the parties stipulate either in writing or on the record "to all or part of the facts involved in the controversy". Mr. Lee, in Bd. Ex. 12C, p. 5, suggests that the phrase "unless a hearing is required by law" be added to this item well. Judge Klein, in Bd. Ex. 12D, p. 4, agrees with Mr. Lee's suggestion. Judge Klein further states that the phrase "or part of the facts" in item C should be deleted and "material facts" inserted. Judge Klein believes that insertion of the suggested language would make the item consistent with the treatment of item A of this subpart 2. The rule, as currently drafted, woul allow the Board to deny a hearing to an individual who stipulates to some of the facts involved in the controversy. This would deny the person a right t hearing on disputed material issues of fact, even if the person had a right either by statute or constitutional law to a hearing. Further, the Administrative Law Judge does not believe that the parties through stipulati can avoid at least the convening of a contested case hearing, if a hearing i required by law. For the reasons stated in Finding 74, supra, item C is illegal in that it allows the Board to deny a hearing when one is required b law or in circumstances in which a party has a right to a full hearing on contested factual issues.

79. To correct the defect, the Board must amend item C of the subpart follows: After the word "all" in the second line of item C, strike "or part the" and insert "material" and after the word "controversy", insert ", unles hearing is required by law". This amendment would not result in a prohibite substantial change.

80. Item D of subpart 2 would allow the Board to dispense with a contested case hearing whenever a matter was uncontested or unprotested. Ev some uncontested proceedings, however, may require convening a public hearin Minn. Stat. § 219.70 (1990), for example, provides:

> A company desiring to abandon a shop or terminal in this state shall first apply to the board in writing. Before

> passing on the application the board shall order a hearing. (Emphasis added.)

In this situation, the Board has no option to avoid a hearing, even if no protest or objection to the petition is filed. Item D is, therefore, illega

81. To correct the defect, the Board must insert in item D after "proceeding" and before the period the following: ", unless a hearing is required by law". The amendment is required by law and does not result in a

prohibited substantial change. As amended, subpart 2 is both needed and reasonable.

82. The Board may also correct the adverse Findings with respect to items A-D of subpart 2 by striking the word "The" in the first line of subpa 2 and inserting "Unless a contested case hearing is required by law, the". Insertion of the phrase at the beginning of the subpart would avoid repetiti insertion of the same phrase in each item.

83. Subpart 3 provides that a motor carrier who does not become a protestant to a proceeding waives his right to testify at a hearing in the case. Given the limitation of the scope of these rules stated in part 8920.0200, this rule can only have application to original proceedings befor the Board and may not apply to a contested case hearing conducted by an administrative law judge. If it were the Board's intent to foreclose an administrative law judge from receiving the testimony of a motor carrier who did not file a timely protest, the rule would violate the intervention rule the Office of Administrative Hearings, 1400.6200 (1991), and the right of th administrative law judge to take testimony from interested persons who are n parties to the proceeding, Minn. Rules pt. 1400.7100, subp. 5 (1991). A num of commentators including Judge Klein and Mr. Lee argued that the rule may n legally restrict the right of the administrative law judge to take testimony from nonparty motor carriers. Bd. Ex. 12D, p. 4; Bd. Ex. 12C, p. 5. The Association, in both its initial and reply comments, also stated that the ru may not appropriately limit testimony by competing motor carriers in contest case proceedings. The Board, in its response to public comments filed Decem 16, 1991, at page 6, apparently argues that the rule should limit the author of the administrative law judge and was meant to avoid the result in Northern Messenger, Inc. v. Airport Couriers, Inc., 359 N.W.2d 302 (Minn. Ap 1984). For the reasons previously discussed in a number of Findings, the Bo has no authority to regulate the conduct of a contested case hearing before administrative law judge. Under Minn. Stat. § 14.51 (1990), the rules of th Office of Administrative Hearings have primacy in contested case hearings conducted by the Office. The rule as drafted is needed and reasonable if it has no application to a contested case hearing conducted by the Office of Administrative Hearings. To avoid a conflict with OAH rules, the word "hearing" in the last line of the subpart must be construed to refer to an original hearing before the Board. See, proposed Rules pt. 8920.0200, Findi 24 and 25, supra. To avoid confusion, however, particularly in light of the comments filed by the Board on December 16, 1991, the administrative law jud strongly suggests that the last line of the subpart be stricken and the following inserted: "testify at a hearing before the Board on the matter." The addition of the language would not result in a prohibited substantial change because the amendment merely clarifies the relationship of this subpa to the legally appropriate scope of these rules. Failure to adopt the clarifying amendment, however, would not result in a defect. As applied to

original hearings before the Board, subpart 3 is found to be needed and reasonable.

84. Minn. Rules pt. 8920.3100, subp. 4 initially incorporated the contested case rules of the Office of Administrative Hearings. Judge Klein, Bd. Ex. 12D, stated that incorporation by reference of the rules of the Offi of Administrative Hearings would create confusion particularly because the proposed rules, as drafted, had a number of inappropriate references to administrative law judges and conflicts with the contested case rules of the

Office of Administrative Hearings. In Bd. Ex. 18, the Board proposed to del subpart 4 to avoid confusion. No party objected to the deletion. The delet of subpart 4 incorporating the contested case rules of the Office of Administrative Hearings is appropriate and does not result in a prohibited substantial change.

85. The proposed rules published by the Board did not contain a provis regarding the appearance of attorneys or representation of parties appearing before the Board. Prior to the hearing, the Board proposed to continue in effect Minn. Rules pt. 7830.3000, subp. 1 (1985), the Public Utilities Commission rule, currently applicable to the Board. The Board did not publi notice of its intent to continue Minn. Rules pt. 7830.3000 in effect. At th hearing, however, the Board proposed the following renumbered subpart to the rules:

> Subpart 4. Appearances of attorneys. Parties, except individuals appearing on their own behalf, must be represented by counsel. Participants, as defined in part 9010.0100, subpart 15, need not be represented by counsel. Persons holding specific authority to practice before the Board in their areas of expertise may continue to do so within the express limits of that authority.

Board Ex. 18. Except for the internal citation to the definition of "participants" and the reference to the Board, the proposed rule is identica to existing Minn. Rules pt. 7830.3000, subp. 1 (1985), applicable to the Boa as a consequence of Minn. Stat. § 174A.06 (1990). The Minnesota Transport Services Association and Mr. Rosenthal, in their comments of December 11, 19 and December 16, 1991, argue that the rule may deprive members of the Association of their right to be represented by Mr. Rosenthal. The Associat then argues that representation of its members by attorneys or by a person holding specific authority to practice before the Board would increase the c of representation and may deprive members of their practical ability to appe before the Board. Indianhead Truck Line, Inc., in their comments of Decembe 9, 1991, supports adoption of the rule. Mr. Samuel Rubenstein, a certified practitioner, appeared at the hearing in support of the amendment. He also filed a written comment on December 16, 1991, supporting the amendment. The Board in its response to public comments dated December 16, 1991, states tha it is not the purpose of this proceeding to determine whether Mr. Rosenthal engaged in the unauthorized practice of law in his representation of Association members. Counsel to the Board recognized that an agency cannot legalize what the Minnesota State Supreme Court would otherwise consider illegal, since the Supreme Court has ultimate authority to define what constitutes the unauthorized practice of law. Fitchette v. Taylor, 254 N.W 910 (Minn. 1934).

86. The proposed subpart and the existing rule, Part 7830.3000, subp. (1985), are, however, significantly more restrictive than a prohibition on unauthorized practice of law before the Board. An individual who is not an attorney or appearing on his own behalf can only appear before the Board if that person holds some specific authority from the Board to practice, even though the activity would not constitute the unauthorized practice of law. Colorado Supreme Court has considered the issue of what constitutes the unauthorized practice of law in the context of appearing before its Public Service Commission. Denver Bar Association v. Public Utilities Commission,

154 Colo. 273, 391 P.2d 467 (1964). The Court, at 391 P.2d 472, discusses t types of activity before a regulatory board that could be authorized by rule without sanctioning the unauthorized practice of law. The amendment appears reflect a desire by the Board to limit appearances before it to attorneys an persons with some undefined area of specialty that has been previously recognized by the Board at some time in the past. The justification for such an approach is a conclusion that practice before the Board is so specialized that, even where the unlicensed practice of law is not an issue, only a recognized specialist is appropriate. If this is not the Board's reasoning process and it desires merely to prohibit the unauthorized practice of law before it, the more appropriate provision to adopt would be Minn. Rules pt. 1400.5800 (1991), quoted in Finding 88, infra. Since Minn. Rules pt. 1400.5 (1991) reflects the common law position without modification, its adoption would be needed and reasonable and would not result in a prohibited substant change.

87. If the Board believes that it is more appropriate to restrict practice before it beyond Minn. Rules pt. 1400.5800 (1991), it should adopt proposed subpart. Because the proposed subpart merely continues in effect a preexisting rule, without enlargement, the Board need not demonstrate the ne for and reasonableness of the subpart. Minn. Rules pt. 1400.0500, subp. 1 (1991). The internal reference in the amendment to "Participants", however, incorrect. The correct reference should be to part 8920.0100, subp. 6. It would also clarify the subpart if the word "counsel" were stricken where it appears and the phrase "an attorney" substituted. Finally, after the word "expertise", a specific date should be inserted. The date chosen could be t effective date of part 7830.3000, subp. 1 (1985), or the anticipated effecti date of this subpart. The suggested clarifying amendments would not consti prohibited substantial changes.

88. The proposed subpart 4 can have no application to appearances in a contested case hearing before an administrative law judge. Minn. Rules pt. 1400.5800 (1991) provides:

> Parties may be represented by an attorney throughout the proceedings in a contested case, by themselves, or by a person of their choice if not otherwise prohibited as the unauthorized practice of law.

The rule of the Office of Administrative Hearings states the common law position. The current rule applicable to the Board, carried into effect by proposed amendment, prohibits a nonattorney from representing another party matters which do not constitute the unauthorized practice of law, unless tha person has a special expertise previously recognized by the Board or its predecessor agencies. The rule of the Office of Administrative Hearings, on the contrary, imposes no such restriction. As a consequence of Findings 24 25, supra, the proposed subpart applies only to original proceedings before

Board or contested case proceedings before referral to an administrative law judge or after the issuance of his or her recommended decision. Proposed subpart 4 does not conflict, therefore, with Minn. Rules pt. 1400.0500, subp (1991).

89. Because the proposed subpart was not published prior to the hearin the issue of substantial change must be considered. Minn. Rule pt. 1400.110 subp. 2 (1991), defines substantial change. The inquiry is not whether the

amendment proposed is a "substantial change" over existing rules. Rather, t inquiry is whether the amendment constitutes a "substantial change" over the rules published with the original notice of hearing. Minn. Rule 1400.1100, subp. 2 (1991). The adoption of proposed subpart 4 does not result in a prohibited substantial change. Continuation of the existing rule regarding appearances before the Board does not affect a class of person who could not have reasonably been expected to comment on the proposed rules at the rulemaking hearing. Interested participants did comment at the hearing abou the propriety of the proposed subpart. The addition of proposed subpart 4 d not go to a new subject matter of significant substantive effect, nor does i result in a major substantive change so as to avoid public reaction at the hearing. It does not result in a rule fundamentally different in effect fro that originally noticed. Participants at the hearing were aware of the amendment and significant public comment was directed to its content. Perso receiving notice were aware that the Board was adopting a comprehensive code practice and procedure. The notice alerted the public that specific proposa might be modified as a result of the hearing.

90. At the hearing herein, and in Board. Ex. 18, the Board proposed to add to part 8920.3100, subps. 5-15, relating to hearings before the Board. These sections, except for the substitution of the word "Board" for the word "commission", are identical to Minn. Rules pt. 7830.3000, subp. 2-12 (1985). The retention of these sections was necessitated by the Board's withdrawal o published subpart 4 of part 8920.3100 which would have incorporated the rule of the Office of Administrative Hearings. No adverse public comment was received on the amendments adding subparts 5-15. Because these amendments merely continue in force preexisting rules, the Board need not demonstrate t need for and reasonableness of these parts. The amendments do not constitut substantial change within the meaning of Minn. Rules pt. 1400.1100, subp. 2 (1991). See, Finding 89, supra. Although the inclusion of the amended subparts in this rule is appropriate, it should be clearly noted that these subparts, and the whole rule relating to hearings, have no application to hearings conducted before an administrative law judge under the contested ca rules of the Office of Administrative Hearings. For the reasons discussed i Findings 24 and 25, supra, this part applies only to original hearings befor the Board.

91. Subpart 16, previously numbered subpart 5, of part 8920.3100, rela to the preparation of transcripts. The rule as published would have allowed the Board to require a transcript if exceptions were taken to a finding of f by an administrative law judge or if a hearing was scheduled to last more th one day. The rule also included the following statement: "The transcript i to be prepared at the expense of the petitioner or complainant and, at the discretion of the Board, protestants or respondents."

A number of commentators including Judge Klein, Mr. Lee, Mr. Ballenthin and Indianhead Truck Line commented on the apparent intent of the Board to

require a transcript in certain cases at the expense of a participant. The comments stated that requiring a transcript could be an unbearable burden to certain participants. Judge Klein, in Bd. Ex. 12D, p. 4, also stated that he believed the Board's proposal violated Minn. Stat. § 14.58 (1990), which provides that a party or agency requesting a transcript must pay for its preparation. Apparently in response to Judge Klein's comments, the Board withdrew the quoted language relating to payment for a transcript requested by the Board. Bd. Ex. 18.

92. It could be argued that the use of the word "may" in this subpart gives inappropriate unlimited discretion to the Board as to when it may requ a transcript. The subpart does, however, contain two standards: the hearin must either be scheduled to last more than one day; or it must be one in whi parties have filed exceptions to findings of fact made by the administrativ law judge. If either of those two circumstances exist, it would be within t discretion of the Board to order a transcript. A rule is sufficiently speci when a standard is proposed that is as developed as is possible given the subject matter of the rule. Can Manufacturers Institute, Inc. v. State, 289 N.W.2d 416, 423 (Minn. 1979); City of Livonia v. Department of Social Servic 333 N.W.2d 151, 158 (Mich. App. 1983), aff'd, 378 N.W.2d 402, 418-20 (Mich. 1985). The discretion placed in the Board when either standard has been met typical of the rules that exist on the issue of providing a transcript, even within the rules of the Office of Administrative Hearings. See, e.g., Minn Rules pt. 1400.0950 (1991); Minn. Rules pt. 1400.7400, subp. 2 (1991).

93. This subpart with the deletion of the language regarding payment i both needed and reasonable and contains appropriate standards for its application. The Board should have wide discretion in ordering transcripts when it bears the cost. Since the agency merely deleted language which it thought conflicted with Minn. Stat. § 14.58 (1990), the deletion did not res in a prohibited substantial change. Minn. Rules pt. 1400.1100, subp. 2 (1991).

Other Hearing Procedures; Posthearing Considerations

94. In Bd. Ex. 18, the Board proposes to continue in effect the follow rules of the PUC applicable to the Board with the word "commission" deleted the word "Board" inserted and with necessary internal references changed to comply with the numbering system of the proposed rules: Minn. Rules pt. 7830.3400, conference recommended by presiding officer, renumbered as 8920.3200; 7830.3500, stipulation, renumbered as 8920.3300; 7830.3600, witnesses, renumbered as 8920.3400; 7830.3100, written notice, renumbered as 8920.3500; and 7830.3300, prehearing conferences and settlement conferences, renumbered as 8920.3600. No adverse comment on the retention of these rules was received from any member of the public. Inclusion of these rules is appropriate since the contested case rules of the Office of Administrative Hearings were not incorporated by reference. Moreover, since the parts mere continue existing rules, the Board need not demonstrate the need for and reasonableness of these provisions. Therefore, adoption of renumbered parts 8920.3200 - 8920.3600, with the changes stated in Bd. Ex. 18, is appropriate The amendments do not constitute a prohibited substantial change within the meaning of Minn. Rules pt. 1400.1100, subp. 2 (1991).

95. For the reasons previously discussed, the parts enumerated in the previous Finding apply only to original proceedings before the Board or to contested case proceedings where an administrative law judge does not have jurisdiction over the proceedings. See, Findings 24 and 25, supra.

96. Part 8920.3200, renumbered as part 8920.3700, relates to the filin of exceptions to the recommended decision of an administrative law judge. Subpart 1 attempts to regulate the decision of an administrative law judge i

a contested case hearing and the manner in which the recommended decision mu
be served. The Transportation Regulation Board is without jurisdiction to
define the contents of a recommended decision of the administrative law jud
or to prescribe the manner of serving such a report. Moreover, the subpart
conflicts with Minn. Rules pt. 1400.8100, subp. 3 (1991). Subpart 1,
therefore, is illegal.

97. To correct the defect, the Board must strike subpart 1 and renumbe
the remaining subparts so that the current subpart 2 becomes subpart 1 to th
part. It would also be appropriate for the Board to insert in the second an
third lines of subpart 2 after the phrase "recommended decision" and before
comma the following: "of an administrative law judge in a contested case
hearing".

98. Subpart 2 of this part discusses the filing of exceptions. The
subpart attempts to allow additional time when the Central Mailing Section i
used in accordance with part 8920.0150. In Board Exhibit 18, however, the
Board proposed to eliminate the language relating to allowing extra time whe
the Central Mailing Section is used, apparently as a consequence of adverse
comment about the unworkability of that provision. See, Finding 22, supra.
Since the Board has proposed that amendment to part 8920.0150, subp. 2, simi
language in this subpart should also be deleted. This could be accomplished
striking the following sentences in the subpart:

> "Since the postmark would be later than the issue date when an order is sent by the board through the Central Mailing Section, four days is added to the prescribed period of 20 days in accordance with part 8920.0150. If an order is mailed without going through the Central Mailing Section, three days is added to the prescribed period in accordance with part 8920.0150."

The following sentence should be inserted in lieu of the stricken material:
"If exceptions are mailed, three days is added to the prescribed period of
20 days in accordance with part 8920.0150."

99. Mr. Ballenthin commented on the use of the words "postmark" and
"postmarked" in the subpart. The word "postmark" or "postmarked" could only
used by the Board in the sense of mailed or placed in the United States mail
postage prepaid. Under that definition, the subpart is both needed and
reasonable. The Administrative Law Judge, however, strongly suggests to the
Board that it drop the word "postmarked" and insert "mailed". The amendment
suggested by the Administrative Law Judge do not constitute a prohibited
substantial change since they are made in response to other approved amendme
or are merely clarifying language which does not change the application of t
rule.

100.It should be noted that this subpart also contains the word "filed" As discussed in Finding 36, supra, filed means received by the quasi-judicia authority within the prescribed period. Under that meaning, exceptions mai to the Board must be received by it within 23 calendar days after the issua date of the recommended decision of the administrative law judge. See, part 8920.0150. If "filed" is meant in any other sense, the meaning should be clarified.

101.Subparts 3-5 are supported by the Revised SONAR and did not receive adverse public comment. They are found to be needed and reasonable.

102.Part 8920.3300 has been renumbered as part 8920.3800 and part 8920.3400 has been renumbered as part 8920.3900. Both of the these parts ar discussed in the Revised SONAR and did not receive adverse public comment. parts, as renumbered, are found to be both needed and reasonable.

103.Part 8920.3500 has been renumbered as part 8920.4000. The part relates to petitions for further hearing. It was the intention of the Board continue a previously existing rule. In the published rules, the word "written" appeared as "rewritten". The Board proposes to amend this part to remove the typographical error, in response to public comment from Mr. Ballenthin. See, Bd. Ex. 12A, p. 3; Bd. Ex. 18. Because the rule is discus in the Revised SONAR, merely continues a pre-existing rule and was not the subject of adverse comment, it is found to be needed and reasonable, with th correction of the typographical error. The correction of the typographical error does not result in a prohibited substantial change.

104.Part 8920.3600 has been renumbered as part 8920.4100. It relates t Board final orders, their manner of service and effective date. The only comment received on this part was made by Mr. Ballenthin. Bd. Ex. 12A, p. 3 Mr. Ballenthin questions the wisdom or propriety of Board orders being effective upon filing, particularly when a client may not receive a Board or for a period of time. During that time, technically, the individual could b in default of the Board order. The Board, in its Revised SONAR, Bd. Ex. 15, 36, states:

> This subpart seemed reasonable, but if parties are actually receiving orders seven or eight days after the service date, perhaps the rule should have an effective date of 15 days later.

The Board did not, however, propose that amendment in Bd. Ex. 18. Whether t Board now considers such an amendment appropriate is unclear. The absence o delayed effective date to Board orders does not create a defect in the rule long as the order itself gives a reasonable period for compliance when an obligation is imposed. It is, therefore, needed and reasonable as submitted The Board, however, should seriously consider whether it wishes to amend subpart 3 to allow for an automatic delayed effective date in accordance wit its statement made in the Revised SONAR at page 36. If the Board does adopt such an amendment, it would be supported by Mr. Ballenthin's comments made i Bd. Ex. 12A, p. 3. It would not constitute a prohibited substantial change

105.Part 8920.3700, renumbered as part 8920.4200, relates to petitions further action. Part 8920.3800, renumbered as part 8920.4300, relates to th amendment of effective dates. Part 8920.3900, which relates to a second

petition on the same ground, has been renumbered as part 8920.4400. All of these provisions continue in effect pre-existing rules, are discussed in the Revised SONAR, and did not generate adverse comment at the hearing. The thr parts are, therefore, appropriately included in the proposed rules without a demonstration of need and reasonableness.

106.Part 8920.4000, relating to variances, has been renumbered as part 8920.4500. The part states the conditions under which variances may be

granted and the procedures for implementing variances. The Department of Transportation commented that the rule as drafted was too broad. Bd. Ex. 12 p. 2. It desired that the Board state which specific portions of the rules could be waived. The Department is also concerned that the variance provisi would allow semi-permanent blanket exemptions from the rules, not based on a particular showing of need. No language in the part justifies the concerns the Department. The rule requires that specific justification for each variance from the rules be substantiated, that the criteria for each varianc stated in subpart 1A, B, and C be applied by the Board and that the Board ha the authority to revoke a variance or require alternative practices. Final the substance of the variance provision is the same as the existing rule, Mi Rules part 7830.4400 (1985). Renumbered part 8920.4500, variance, is found be needed and reasonable.

107.Other commentators suggest additional provisions the Board might consider in its rules of practice and procedure. Specifically, the Departme of Transportation urged that the Board adopt rules relating to external ex parte communications with Board members regarding a proposed or pending matter. Board Ex. 12, p. 2. While the Administrative Law Judge agrees that such rules would definitely be appropriate, the failure to include those rul in the current rules of practice is not a defect.

108.Rules not otherwise specifically discussed in this Report were show to be needed and reasonable with an affirmative presentation of facts. Likewise, rule amendments not specifically discussed were shown to be authorized and not to involve prohibited substantial changes.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Board gave proper notice of the hearing in this matter.

2. The Board has fulfilled the procedural requirements of Minn. Stat. §§ 14.14, subds. 1, 1a and 14.14, subd. 2, and all other procedural requirements of law or rule.

3. The Board has demonstrated its statutory authority to adopt the proposed rules and has fulfilled all other substantive requirements of law o rule within the meaning of Minn. Stat. §§ 14.05, subd. 1, 14.15, subd. 3 and 14.50 (i)(ii), except as noted at Findings 18, 24, 30, 40, 56, 59, 62, 64, 6 68, 74, 78, 80 and 96, supra.

4. The Board has documented the need for and reasonableness of its proposed rules with an affirmative presentation of facts in the record withi the meaning of Minn. Stat. §§ 14.14, subd. 2 and 14.50 (iii).

5. The amendments and additions to the proposed rules which were suggested by the Board after publication of the proposed rules in the State Register do not result in rules which are substantially different from the proposed rules as published in the State Register within the meaning of Minn Stat. § 14.15, subd. 3, and Minn. Rule 1400.1000, subp. 1 and 1400.1100.

6. The Administrative Law Judge has suggested action to correct the defec cited in Conclusion 3, supra, as noted at Findings 19, 25, 31, 41, 57, 60, 6 65, 67, 69, 75, 79, 81, 82 and 97, supra.

7. Due to Conclusions 3 and 6, supra, this Report has been submitted t the Chief Administrative Law Judge for his approval pursuant to Minn. Stat. § 14.15, subd. 3.

8. Any Findings which might properly be termed Conclusions and any Conclusions which might properly be termed Findings are hereby adopted as su

9. A finding or conclusion of need and reasonableness in regard to any particular rule subsection does not preclude and should not discourage the Board from further modification of the proposed rules based upon an examinat of the public comments, provided that no substantial change is made from the proposed rules as originally published, and provided that the rule finally adopted is based upon facts appearing in this rule hearing record.

Based upon the foregoing Conclusions, the Administrative Law Judge make the following:

RECOMMENDATION

It is hereby recommended that the proposed rules be adopted except when specifically otherwise noted above.

Dated this _____ day of January, 1992.

s/ Bruce D. Campbell
BRUCE D. CAMPBELL
Administrative Law Judge

Reported: Tape Recorded.